# Board of Alien Labor Certification Appeals

**UNITED STATES DEPARTMENT OF LABOR**
**WASHINGTON, D.C.**

DATE: April 28, 1997

CASE NO: 95-INA-518

**In the Matter of:**

**OBGYN Physicians of Washington Chartered**
**Employer,**

**On Behalf of:**

**Aida Estera,**
**Alien**

Appearance: D. J. Rothwell, Esq., Washington, D. C.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

## DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Aida Estera (Alien) by OBGYN Physicians of Washington Chartered (Employer) under § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

**Statement of the Case**

On February 2, 1994, the Employer applied for labor certification to permit it to employ the Alien on a permanent basis as a "Medical Record Technician" to perform the following duties:

> Compile and maintain medical records of patients to document patient condition and treatment. Review records to code clinical data using standard classification systems. Maintains and utilizes variety of record indexes and storage and retrival (sic) systems.

The position was classified as Medical Record Technician under DOT Code No. 079-362-014.[2] The application (ETA 750A) indicated no minimum education requirement, but required that applicants must have two years of experience in the Job Offered or in the Related Occupation of "Record keeping/indexing." AF 50[3]

After receiving the results of the Employer's recruitment effort, the CO issued a Notice of Findings (NOF) on December 8, 1994. AF 26-27. The CO proposed to deny certification on the grounds that the case file fails to demonstrate that this position is clearly open to qualified U.S. workers, citing 20 CFR § 656.20(c)(8). The CO directed that the Employer must establish that the job existed before the date of the application, February 14, 1994. AF 26-27. The CO directed the Employer to rebut this finding by producing documentation setting forth detailed

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The position is supervised by a physician and supervises either one or no other employee. The Alien is a national of the Philippines. She has completed college with a baccalaureate degree in the science of education and she earned a graduate degree in library science. After working for some ten years as a librarian in the engineering department of a college from 1972 to 1992, the Alien worked as a nursing home attendant in San Jose, California, from October 1992 to June 1993, and as a housekeeper in the private residence of Dr. Kenneth Blank, one of the principals of the Employer, from July 1993 until the date of application. AF 52-53.

information as to the nature, content, and conditions of this job, as well as the circumstances under which it originated.

By way of rebuttal on March 2, 1995, the Employer furnished a response indicating that the position was created during 1994 in response to the growth of its medical practice and the record keeping necessary to its management. AF 23-25.

Thereafter, on April 4, 1995, the CO issued a second NOF in which the rebuttal was addressed and new issues were raised. In this new NOF the CO now found that the Employer violated 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), which require that the position be clearly open to any qualified U. S. workers and that the U. S. workers who applied for the job may be not be rejected except for reasons that are lawful and job-related. Of the nine applicants, two were rejected on grounds that they lacked the required experience, Dennis Curtis and Thornell Johnson.

The Employer's rebuttal, which was transmitted May 8, 1995, observed that the second NOF did not raise any issue that could not have been raised in the first NOF and should be withdrawn. The Employer nevertheless responded to the second NOF, as directed. First, the Employer alluded to the resumes of Mr. Curtis and Mr. Johnson, explaining that neither applicant had the requisite two years' experience either in the work of a Medical Records Technician or in Record Keeping/Indexing. Compare AF 10-12. Employer pointed out that the background of Mr. Curtis was as a clerk or office assistant, while Mr. Johnson had no office experience at all.

In a Final Determination (FD), dated May 24, 1995, The CO denied certification on the grounds that the Employer rejected one of the nine U. S. workers who had applied for this position and that its reasons for rejection were not substantiated by adequate documentation. The CO concluded that Mr. Curtis was rejected for reasons that were not lawful and job-related and that Employer violated 20 CFR §§ 656.20(8)(8) and 656.21(b)(6). The CO explained that Mr. Curtis's resume "clearly shows" one and one-half years of experience in performing clerical duties, three and one-half years of experience in mail handling, and two and one-half years of experience in merchandise receiving and record keeping, all of which could "be categorized as experience in record keeping/indexing" within the meaning of the application. Concluding that this U. S. worker met minimum job requirements and was qualified for the position, the CO found the Employer's reasons for rejecting this applicant were not lawful and job-related.

## DISCUSSION

The Employer's brief on appeal contended that the CO was in error because (1) the CO issued two separate NOF's relating to

different deficiencies, arguing that this is inconsistent with the provision in the Technical Assistance Guide (TAG) that an additional NOF may be issued when the rebuttal raises new issues which were not contained in the original application; and (2) the CO incorrectly concluded that the Employer could not reject Mr. Curtis on the basis of his resume.

(1) It is well-established that the CO cannot raise an issue for the first time in the FD. **Marathon Hosiery Co.**, 88-INA-420 (May 4, 1989)(en banc); **Dr. & Mrs. Frederic Witkin**, 87-INA-420(May 4, 1989). Consequently, an employer's appeal on grounds that the CO promulgated more than one NOF is unusual, the error more commonly being the deprivation of due process inherent in a CO's failure to provide the employer an opportunity to confront new issues or findings of fact within the meaning of 20 CFR § 656.25(c)(20). **Downey Orthopedic Medical Group**, 87-INA-674(Mar. 16, 1988)(en banc); **Counterpoint Development Company**, 89-INA-153(Mar. 12, 1990); **Tarmac Roadstone (USA), Inc.**, 87-INA-701(Jan 4, 1989).[4]

In this case, however, the Employer argues that the CO is estopped by the provisions of the Technical Assistance Guide of the U. S. Department of Labor from issuing a second NOF as to the new issue relating to the rejection of the qualifications of Mr. Curtis. This argument is based on the uncontested fact that Employer's recruitment report was duly filed and was a part of the record at the time the original NOF was issued. While the TAG is not a regulation and is not included in any procedural rule guiding this Board, the Employer's position is inconsistent with the TAG comment on which it relies.

The employer's brief says that the TAG advises at p. 82 that, "Additional Notice of Findings may be issued when the rebuttal raises new issues which were not contained in the original application. ..." While the TAG statement is entirely consistent with the holdings of the above-cited decisions of BALCA, it restates the case holdings that approve the use of a second NOF as a possible remedy in the event of the procedural impasse indicated. In no sense does either the quoted text or its ramifications sugget a prohibition that may block the CO from issuing successive NOF's where the CO deems such a procedure to be appropriate in implementing the Act and regulations. This record does not indicate that the second NOF was used as a device to harass the applicants, and on its face the second NOF appears to correct the CO's omission of this issue in the proposed rejection of certification in the original NOF. As there is no

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[4]Where a CO bases the FD on evidence not first discussed in an NOF, the matter may be remanded to the CO for clarification and issuance of a new NOF. **Dr. Mary Zumont**, 89-INA-35(Nov. 4, 1991); and also see **Nancy Johnstone**, 87-INF-541(May 31, 1989).

basis in law or equity to construe the quoted TAG text to mean any more than the words plainly say, this reason for error is without merit and it is rejected.

(2) In contending that the CO should have concluded that it could reject Mr. Curtis, the Employer argued that on its face his resume does not qualify for the job of Medical Record Technician, citing the duties listed in the application and quoted above, and the Specific Vocational Preparation level for the job, which matches the experience that the Employer required. Noting the alternative experience in the related occupation of record keeping and indexing, the Employer argued that, "This is not a job for which a mail clerk can qualify. The job requires either specific experience in the job or experience in a record keeping position, not a mail sorting position." (Emphasis as in original.) Pointing out that the skills Mr. Curtis listed in his resume were "clerical duties, filing, Xeroxing, moving office supplies and miscellaneous," the Employer argued that none of these encompassed the expertise required in record keeping, and it concluded that it should not be required to interview a job applicant with this background when it seeks a medical records technician.[5]

The Employer summarized by arguing that after its reasonable evaluation of the nine resumes of U. S. workers who sought the job, it duly reported its results to the CO, who did not raise any question until after the Employer rebutted the defects raised in the NOF. Only then, it contends, did the CO question whether or not it should have interviewed Mr. Curtis and Mr. Johnson in a second NOF, contending that "this after-the-fact questioning by the C.O. is procedurally incorrect" and that it decided not to interview Mr. Curtis for valid reasons and not for the purposes of avoiding a recruitment of U. S. workers.

While its decision that the qualifications of Mr. Curtis did not merit an interview was well reasoned, the Employer bears the burden of proof on issues leading to a determination as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161(Dec. 7, 1988)(en banc). The resume of Mr. Curtis does include clerical duties and filing, as the Employer pointed out. The work as a mail handler that it also includes encompassed the classification and filing of incoming

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[5]The Employer said the U. S. workers to whom it did offer interviews had held positions that it said were relevant to medical record keeping, listing four job candidates who had been medical records clerks, as well as one who had experience as a system administrator in document control, one who had worked as a data technician in document analysis, and another one who had "administrative experience working with medical records." By contrast, Employer argued, Mr. Curtis never held a position in which he was responsible for creating records, indexing records, or interpreting information, the alternative skills necessary to this job.

and outgoing items that required Mr. Curtis to perform duties that could be compared to the compilation and maintenance of patients' records, the review and coding of clinical data according to standard classification, and the use of record indexing, storage, and retrieval systems. Also, for five months Mr. Curtis reviewed, evaluated, and processed claims of various types for an insurance company. Moreover, his asserted "key skills" included the use of a broad range of modern office devices, as well as retail management and associated merchandise processing that would add to his capacity to do the work of a medical record technician. On the other hand, the existence, degree, and value of such skills in this position cannot be determined definitively without more. His resume would suggest that he could qualify if further information were developed by reason of the versatility of Mr. Curtis' experience in record handling, however. Consequently, it is inferred that the negative evidence that Mr. Curtis' resume was insufficient to qualify him for this job was not so strong as to justify the Employer's rejection out of hand without an interview, based on a comparison of his resume with the position requirements.

Conclusion. It is well-established that where an applicant's resume raises the reasonable possibility that he is qualified for the job, the employer bears the burden of further investigating the applicant's credentials. **Gorchev v. Gorchev Graphic Design**, 89-INA-118(Nov. 29, 1990)(en banc). This Employer's reasons for doubting Mr. Curtis' expertise justified the close scrutiny of an interview to determine whether or not he was qualified for the position at issue, given the broad nature of the representations of his resume. Because the Employer did not interview him, it could not determine whether or not the experience he described was sufficient for the performance of the duties of the position at issue. While an applicant is qualified for the job, if he meets the minimum specified requirement shown in the application, it cannot be demonstrated that this U. S. worker was qualified or unqualified because no interview occurred. Compare **Veterans' Administration Medical Center**, 88-INA-070(Dec. 21, 1988)(en banc). For these reasons, it is concluded that the Employer did not sustain its burden of proof. **Cathay Carpet Mill, Inc.**, supra.

Accordingly, the following order will enter.

**ORDER**

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

# BALCA VOTE SHEET

**OBGYN Physicians of Washington Chartered, Employer,**
**Aida Estera, Alien**

CASE NO : 95-INA-518

PLEASE INITIAL THE APPROPRIATE BOX.

| | CONCUR | DISSENT | COMMENT |
|---|---|---|---|
| Holmes | | | |
| Huddleston | | | |

Thank you,

Judge Neusner

Date: March 28, 1997